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10 | Attorneys for Defendant Elon Musk

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

| Case No. 2:18-cv-08048

Judge: Hon. Stephen V. Wilson

**DEFENDANT'S MOTION IN
LIMINE NO. 1 TO EXCLUDE
EVIDENCE OF DEFENDANT'S
UNRELATED TWEETS AND SEC
SETTLEMENT AGREEMENT**

Complaint Filed: September 17, 2018
Trial Date: December 2, 2019

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 Defendant Elon Musk moves for an order, in limine, precluding Plaintiff
 3 Vernon Unsworth from introducing evidence or argument regarding: (1) Mr. Musk's
 4 tweets of August 7, 2018, October 26, 2018, which relate to discussions of taking
 5 Tesla private and a resulting settlement with the Securities and Exchange
 6 Commission ("SEC"); (2) anything relating to the topics of these tweets and SEC
 7 settlement, including the fact of an SEC investigation and the final settlement
 8 amount; and (3) any other tweets unrelated to this case.

9 **FACTUAL BACKGROUND**

10 On August 7, 2018, Mr. Musk tweeted: "Am considering taking Tesla private
 11 at \$420. Funding secured." (the "August 7 tweet") (Omnibus Declaration of Michael
 12 Lifrak ("Lifrak Decl.") in Support of Motions in Limine, Ex. 4). On September 28,
 13 2018, Mr. Musk and Tesla reached a settlement agreement, in which, among other
 14 things, Mr. Musk did not admit or deny wrongdoing and which required Mr. Musk to
 15 pay the SEC \$20 million (the "SEC Settlement"). *See SEC v. Tesla, Inc.*, 1:18cv-
 16 8947-AJN-GWG, Dkt. Nos. 1, 3. In October 2018, a Twitter user tweeted at Mr.
 17 Musk, asking him: "How about that one [the August 7 tweet] that cost you 20M, how
 18 was the 'like' ratio on that one?" Mr. Musk replied: "Worth it." (the "October 26
 19 tweet") (Lifrak Decl. Ex. 5). On April 26, 2019, Mr. Musk and the SEC entered into
 20 an amended settlement agreement (the "Amended SEC Settlement"). *See SEC v.*
 21 *Tesla, Inc.*, 1:18cv-8947-AJN-GWG, Dkt. No. 46.

22 **ARGUMENT**

23 Mr. Musk anticipates that Mr. Unsworth may seek to introduce evidence and
 24 argument related to the August 7 tweet, the SEC Settlement, the October 26 tweet,
 25 the Amended SEC Settlement, and other irrelevant tweets. None of this has any place
 26 in this case and would only serve to make a completely irrelevant action the focus of
 27 this trial. If Mr. Unsworth were to claim the falsity of any statement of fact on the
 28 issue of the SEC Settlement, Mr. Musk is fully prepared to litigate it. Asking the jury

1 to hear evidence regarding a “case within a case” would confuse the issues and
 2 unnecessarily prolong the trial.

3 Mr. Unsworth has already repeatedly attempted to infect this case with these
 4 topics, including at Mr. Musk’s deposition. (Lifrak Decl. Ex 1 (Musk Depo., 213:21-
 5 215:19; Musk Depo., Ex. 43)). For example, Mr. Unsworth’s counsel asked Mr.
 6 Musk whether the \$20 million settlement was worth it, in an apparent attempt to
 7 argue that Mr. Musk should pay Mr. Unsworth a similar amount (despite the fact that
 8 Mr. Unsworth has not suffered any actual economic harm) (*Id.* (Musk Depo., 214:7-
 9 10, 215:9-19)). He also asked numerous questions regarding the details of the SEC
 10 settlement. (*Id.*). The Court should not allow this type of prejudicial evidence and
 11 argument to improperly prejudice the jury.

12 This Motion is made pursuant to Federal Rules of Evidence 401, 402, 403, and
 13 408 on the grounds that such evidence is not relevant to any facts in dispute, that any
 14 minimal probative value of the evidence is substantially outweighed by its undue
 15 prejudice to Mr. Musk, and that any information about Mr. Musk’s irrelevant tweets
 16 or the SEC investigation and settlement risk confusing the issues, wasting time, and
 17 inflaming or misleading the jury. The Court should preclude introduction of such
 18 evidence.

19 **I. THE COURT SHOULD PRECLUDE EVIDENCE REGARDING MR.**
MUSK’S IRRELEVANT TWEETS AND THE SEC SETTLEMENTS.

20 **A. The Court Should Preclude Evidence Regarding the SEC Settlement**
and Related Tweets under FRE 401 and 402.

21 Evidence is only relevant if it “has any tendency to make a fact more or less
 22 probable than it would be without the evidence” and that “fact is of consequence in
 23 determining the action.” Fed. R. Evid. 401. Whether Mr. Musk tweeted that he
 24 intended to take Tesla private does not tend to make any fact of consequence in this
 25 action more or less probable.

1 Similarly, whether the SEC opened an investigation and ultimately entered into
2 a settlement agreement with Mr. Musk as a result of the August 7 tweet does not
3 make any fact of consequence in this action more or less probable. There is no fact at
4 issue in this case—which is a defamation case based on a wholly unrelated tweet and
5 an email Mr. Musk sent to BuzzFeed News—that would be made more or less
6 probable if Mr. Musk did enter into such a settlement agreement. The amount of the
7 SEC Settlement also has no tendency to make any fact of consequence in this
8 defamation action more or less probable.

Finally, Mr. Musk’s subjective opinion of whether his August 7 tweet was “worth it” in light of the SEC Settlement, expressed in his October 26 tweet, has no bearing on any fact of consequence in this defamation action.

12 That Mr. Musk made one of his allegedly defamatory statements in this action
13 on Twitter is of no moment. Mr. Musk’s unrelated tweets about taking Tesla private
14 and his interactions with the SEC have nothing to do with his tweets about Plaintiff
15 Vernon Unsworth. “Irrelevant evidence is not admissible.” Fed. R. Evid. 402.
16 Consequently, evidence about Mr. Musk’s August 7 and October 26 tweets, and any
17 related evidence about the SEC investigation and settlement, is not admissible.

20 Mr. Unsworth will likely argue that the dollar amount of Defendant’s
21 settlement agreement with the SEC, and his subjective views about whether his
22 August 7 tweet was “worth it” in light of that twenty million dollar settlement
23 agreement, is probative of Defendant’s wealth, which could bear on the amount of
24 punitive damages the jury awards. Even if this evidence had some probative value (it
25 does not), relevant evidence may be properly excluded “if its probative value is
26 substantially outweighed by the danger of unfair prejudice, confusion of the issues, or
27 misleading the jury” Fed. R. Evid. 403. Rule 408 specifically excludes evidence
28 regarding the “amount” of a settlement.

1 This evidence would unfairly prejudice the jury against Mr. Musk for several
 2 reasons.

3 First, the settlement must be excluded because its admission would be contrary
 4 to Rule 408.¹ The Ninth Circuit has recognized that “Two principles underlie Rule
 5 408: (1) “[t]he evidence [of compromise] is irrelevant, since the offer may be
 6 motivated by desire for peace rather than from any concession of weakness of
 7 position;” (2) “[a] more consistently impressive ground is promotion of the public
 8 policy favoring the compromise and settlement of disputes.” *Hudspeth v. C.I.R.*, 914
 9 F.2d 1207, 1213-14 (9th Cir. 1990). These policies may be implicated in cases
 10 unrelated to the dispute giving rise to the settlement, and thus Rule 408 may bar
 11 admission of the fact or amount of a settlement in an unrelated case. *Id.* at 1214; *see also*
 12 *Cnty. of Maricopa v. Office Depot Inc.*, 2019 WL 5066808, at *10 (D. Ariz. Oct.
 13 9, 2019) (“The Ninth Circuit has interpreted Rule 408(a) as prohibiting a party from
 14 introducing evidence of a settlement in an unrelated case in which it was not a
 15 party.”).

16 Courts routinely exclude evidence of prior settlements, particularly settlements
 17 that do not contain evidence of wrongdoing—like the one here. *See, e.g., Point*
 18 *Ruston, LLC v. Pac. Nw. Reg'l Council of United Bhd. of Carpenters & Joiners of*
 19 *Am.*, 2010 WL 3720277 (W.D. Wash. Sept. 17, 2010) (excluding evidence relating to
 20 consent decree because the consent decree included a denial of wrongdoing and was
 21 unrelated to the instant dispute). In addition, evidence of the SEC investigation and
 22 settlement and Mr. Musk’s tweeted comments also has the potential to confuse the
 23 jury—risk that is particularly apparent when a defendant has entered into a consent

24 ¹ Rule 408 applies to settlements with government agencies. *See, e.g., New*
 25 *Jersey Tpk. Auth. v. PPG Indus., Inc.*, 16 F. Supp. 2d 460, 473 (D.N.J. 1998) *aff'd*,
 26 197 F.3d 96 (3d Cir. 1999) (“Courts agree that Rule 408 applies to civil consent
 27 decrees executed with government agencies . . . Here, there is no question that
 28 [defendant] entered into the 1990 [consent decree] in order to compromise a disputed
 claim; accordingly, Fed. R. Evid. 408 bars reliance upon it as evidence of liability.”).

1 decree that did not find any culpability or judgment of wrongdoing. *See Kramas v.*
 2 *Sec. Gas & Oil Inc.*, 672 F.2d 766, 772 (9th Cir. 1982). In *Kramas*, the Ninth Circuit
 3 upheld the district court’s decision excluding a consent decree entered in a prior SEC
 4 enforcement proceeding where the consent decree “involved no finding of culpability
 5 and no judgment of wrongdoing” and there was a danger of prejudice in admitting
 6 such evidence of other wrongful acts, noting that “the prejudicial impact of the
 7 evidence upon the jury was obviously substantial.” *Id.*

8 To the extent Mr. Unsworth seeks to rely on the \$20 million SEC settlement to
 9 argue that he is entitled to similar damages here, he seeks to use the \$20 million
 10 settlement for a purpose prohibited under Rule 408 – the amount of his claim. Thus,
 11 Rule 408 explicitly forecloses the introduction of the SEC settlement and related
 12 communications for this purpose.

13 Indeed, opening the door to this topic would require the parties to present
 14 evidence regarding an entirely different litigation. *See Kramas*, 672 F.2d at 772
 15 (affirming exclusion of SEC settlement when “admission of the evidence would have
 16 opened large areas of proof on collateral matters). If Mr. Unsworth were to claim the
 17 falsity of any statement of fact on this issue, Mr. Musk is fully prepared to litigate it.
 18 Asking the jury to hear evidence regarding a “case within a case” would confuse the
 19 issues and unnecessarily prolong the trial. Courts routinely exclude evidence of prior
 20 acts on the basis that the confusion and delay would substantially outweigh any
 21 probative value of the evidence. *See, e.g., Bhatti v. Ulahannan*, 414 F. App’x 988,
 22 989 (9th Cir. 2011) (excluding evidence of prior litigation because “allowing the
 23 evidence would effectively require a mini-trial within a trial and likely confuse the
 24 jury.”); *United States v. Aboumoussallem*, 726 F.2d 906, 912–13 (2d Cir. 1984)
 25 (affirming exclusion under Rule 403 because the confusion and delay caused by a
 26 trial within a trial would substantially outweighed the probative value of the
 27 evidence). The Court should do the same here.

28

1 Second, Rule 404 likewise bars the admission of such evidence. Mr. Unsworth
 2 should not be allowed to present evidence or argument suggesting that Mr. Musk is
 3 wealthy and may be willing to pay large sums of money to get himself out of trouble
 4 that results from his tweets. Such evidence should be excluded because it has
 5 minimal probative value and would be extremely prejudicial. Federal Rule of
 6 Evidence 404 provides that “[e]vidence of a person’s character or character trait is not
 7 admissible to prove that on a particular occasion the person acted in accordance with
 8 the character or trait.” Fed. R. Evid. 404. Yet that is exactly what Mr. Unsworth
 9 wants to do. It is inappropriate. *See, e.g. Sunderland v. Bethesda Hosp., Inc.*, No.
 10 13-80685-CV, 2014 WL 11411849, at *2 (S.D. Fla. Sept. 10, 2014) (“prior acts such
 11 as settlements are inadmissible under Rule 404(b) to show ‘character’ and ‘act[ion] in
 12 accordance.’”).

13 **C. The Court Should Also Preclude Evidence Regarding Any Other**
 14 **Tweet from Mr. Musk Unrelated to this Case.**

15 Mr. Musk tweets frequently. He currently has over 9,000 tweets since June
 16 2009. For the same reasons set forth above, Mr. Unsworth should not be permitted to
 17 present into evidence of any other tweet from Mr. Musk unrelated to the issues in this
 18 case – the cave rescue and Mr. Unsworth. Mr. Musk’s unrelated Twitter exchanges
 19 on separate topics have nothing to do with this case, but it could confuse the jury and
 20 lead to a trial within a trial on unrelated issues raised in Mr. Musk’s tweets. Allowing
 21 such evidence also has the tendency to mislead the jury.

22 **CONCLUSION**

23 For the foregoing reasons, Mr. Musk respectfully requests that the Court issue
 24 an order in limine excluding any evidence related to (1) the August 7 tweet, (2) the
 25 October 26 tweet, (3) the SEC investigation pertaining to the August 7 tweet, (4) the
 26 facts of the SEC Settlement, Amended SEC Settlement and the settlement amount,
 27 and (5) any other tweets unrelated to this case.

1 DATED: November 4, 2019

Respectfully submitted,

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